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Intergovernmental Tax Immunity Beyond South Carolina v. Baker

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I. INTRODUCTION

In early American caselaw, the Supreme Court recognized that state governments must be protected from intrusive regulation by the federal government for the dual system of government established by the Constitution to succeed. One of the doctrines the Court inferred from the Constitution to protect the dual system of government was the doctrine of intergovernmental tax immunity.[1] This doctrine protected states from federal taxes which interfered with essential state functions. From the inception of intergovernmental tax immunity, the Court has decided various cases defining essential state functions. The power of the state to borrow money by issuing bonds has traditionally been an essential state function, and income paid to bondholders on those bonds has traditionally been exempt from federal income taxes.[2] However, a recent decision by the Supreme Court has raised doubts about whether a state's borrowing activities, or any other activities of a state government, are still protected by intergovernmental tax immunity.[3]

In *South Carolina v. Baker*,[4] the Supreme Court held that the doctrine of intergovernmental tax immunity does not preclude the federal government from taxing interest earned by bondholders on unregistered bonds issued by state governments.[5] This conclusion is in direct conflict with *Pollock v.*

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

2. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); I.R.C. § 103 (1982).

3. South Carolina v. Baker, 108 S. Ct. 1355 (1988). At issue in this case was the ability of the federal government to impose a tax on income earned from unregistered state bonds. Although a tax on income earned from state bonds is a tax on individuals, the effect of such a tax would be to force states to pay a higher interest rate on the bonds so that the interest rate will be competitive with other investments in the marketplace. If the state cannot afford to borrow at the higher interest rate, the state will not be able to issue bonds. Intergovernmental tax immunity is not limited to direct taxes on states. The doctrine protects states from any tax, on the state or on an individual, which affects a state's ability to perform an essential governmental function. *See infra* notes 20 to 27 and accompanying text.

4. 108 S. Ct. 1355 (1988).

5. The statute at issue in *South Carolina* was section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982. This statute made interest on state bonds taxable

Farmers' Loan & Trust Co.,[6] an 1895 Supreme Court decision holding that state bond interest is immune from federal income tax. The Court in *South Carolina* refused to expressly overrule *Pollock*. The majority concluded that *Pollock* had implicitly been overruled by cases decided between 1895 and 1988.[7]

The Court's opinion addressed only the issue of unregistered state bonds. However, the effect of this decision, coupled with other decisions which have limited the scope of the tenth amendment,[8] could be to eliminate any intergovernmental tax immunity presently enjoyed by the states. This comment examines the caselaw which created intergovernmental tax immunity[9] and the subsequent caselaw which has limited the scope of intergovernmental tax immunity.[10] After examining the trends in the recent caselaw, this comment concludes that states will no longer be able to rely on the doctrine of intergovernmental tax immunity for protection from federal taxes.[11]

II. The Creation of Intergovernmental Tax Immunity

The concept of intergovernmental tax immunity was recognized as early as 1819 in *McCulloch v. Maryland*.[12] In *McCulloch*, the Court concluded that the power to tax is the power to destroy. Although *McCulloch* addressed a tax on the federal government by a state, in 1871 the Court held in *Collector v. Day*[13] that intergovernmental tax immunity applies equally to state and federal governments. In *Day*, the Court invalidated a federal tax on salaries paid by the state to judicial officers.[14] The Court admitted that there was no express provision in the Con-

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if the bonds were unregistered. Interest earned on registered state bonds is still tax exempt. *See* I.R.C. § 103(b)(3) (1982). The ability of Congress to tax interest earned on registered state bonds was not at issue in *South Carolina*.

6. 157 U.S. 429 (1895).

7. *South Carolina*, 108 S. Ct. at 1367.

8. The Court has decided various cases in the last fifteen years involving the scope of the tenth amendment. Two of these cases, National League of Cities v. Usery, 426 U.S. 833 (1976), and Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), will be discussed later in the comment. *See infra* notes 37-55.

9. *See infra* notes 12-27.

10. *See infra* notes 28-36.

11. *See infra* notes 56-71.

12. 17 U.S. (4 Wheat.) 316 (1819).

13. 78 U.S. (11 Wall.) 113, 122 (1871).

14. *Id.* at 126. The Court held that the judiciary is a means of carrying out one of the states' most important functions, the administration of its laws, the exercise of which is a right reserved by the states.

stitution to support an intergovernmental tax immunity, but concluded that "the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."[15]

In *Indian Motorcycle Co. v. United States*,[16] the Court recognized that the concept of intergovernmental tax immunity was inferred from the Constitution, which calls for the maintenance of a dual system of government. At this stage in the development of intergovernmental tax immunity, the state's right to tax immunity was considered to be equal to the federal government's right to tax immunity.[17] The Court reaffirmed this principle in *Burnet v. Coronado Oil & Gas Co.*[18] In *Coronado Oil*, the Court considered each government to be supreme in its sphere.[19]

A. The Scope of Intergovernmental Tax Immunity Defined

The scope of intergovernmental tax immunity has always been limited to immunity from tax on means or instrumentalities essential to the operation of government.[20] The difficult issue in intergovernmental tax immunity cases has been defining what is an essential means or instrumentality of government.

In the late 1800s, the Court began to define the scope of intergovernmental tax immunity. The Court held that a federal tax on salary paid to an officer of the state[21] or on interest in-

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15. *Id.* at 126-127.

16. 283 U.S. 570, 575 (1931).

17. The Court stated:

> It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the state, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States.

Id. at 575. The concept that each government is of equal power is rejected by the Court in *South Carolina*, which stated that some taxes may be collected by the federal government which states would not be able to collect from the federal government. South Carolina v. Baker, 108 S. Ct. 1355, 1366-67 (1988); *see infra* note 57 and accompanying text.

18. 285 U.S. 393, 400 (1932).

19. *Id.*

20. *Coronado Oil*, 285 U.S. at 400; *Indian Motorcycle*, 283 U.S. at 575; Collector v. Day, 78 U.S. (11 Wall.) 113, 126 (1871).

21. *Day*, 78 U.S. at 126. *See supra* notes 13-15 and accompanying text.

come earned from state bonds was an intrusion into an essential government function.[22]

In the early 1900s, the Court extended tax immunity to income generated while serving as an agent of the government, even if the same agent carried on private businesses in the same field.[23] However, the Court held that the agent must provide a means by which the government directly exercises its sovereign powers.[24] The Court also held that income earned by a private party as a result of a lease from a state government is tax exempt if the state uses the proceeds of the lease to fund an essential governmental function.[25] The lease of public lands for the benefit of public schools was held to be an essential government function.[26]

Coronado Oil marked the turning point in intergovernmental tax immunity jurisprudence. Cases prior to and including *Coronado Oil* consistently gave broad application of the doctrine of intergovernmental tax immunity. However, the dissenting opinions in both *Coronado Oil* and *Indian Motorcycle* warned of potential problems associated with expanding tax immunity. Justice Stone, in his dissent in *Indian Motorcycle*, warned that "[t]he practical effect of enlargement [of tax immunity] is commonly to relieve individuals from a tax, at the expense of the government imposing it, without substantial benefit to the government for whose theoretical advantage the immunity is invoked."[27] Cases subsequent to *Coronado Oil* adopted this view

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22. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

23. Indian Motocycle Co. v. United States, 283 U.S. 570, 576 (1931). The Court held that income derived from sales of motorcycles to a municipal corporation to be used by the municipality's police officers was tax exempt.

24. Metcalf v. Mitchell, 269 U.S. 514, 522 (1926). Income earned by an engineering contractor on state contracts for a water supply and sewage disposal project was not tax exempt. The *Indian Motorcycle* opinion distinguished the income from water and sewage contracts in *Metcalf* from the income of the private manufacturer who provided motorcycles to police in *Indian Motorcycle*. Water supply and sewage disposal projects had an indirect or remote bearing on a governmental function while police operations were an essential governmental function. *Indian Motorcycle*, 283 U.S. at 579.

25. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 400-401 (1932). Oklahoma entered into various oil and gas leases with Coronado in connection with the funding of public schools in Oklahoma. As a condition precedent to admission into the Union, Oklahoma was required to provide for common schools in her constitution. Since the oil and gas leases were a means of accomplishing this requirement, entering the oil and gas leases was an essential government function.

26. *Id.*

27. *Indian Motorcycle*, 283 U.S. at 580 (Stone, J., dissenting).

and began to cut back on the scope of the application of the doctrine.

B. The Scope of Intergovernmental Tax Immunity Narrowed

The Court first recognized the need to cut back state tax immunity in 1938.[28] Justice Stone, who had earlier warned of the dangers of expanding intergovernmental tax immunity while dissenting, wrote for the majority. His opinion paralleled his earlier dissent in *Indian Motorcycle*, that expanding tax immunity would result in an expense to one government while the benefit of the immunity would go to private parties and not the state government as the tax immunity doctrine intended.[29] He also noted that as state governments expanded their activities into new fields and assumed the management of business enterprises, as states did in the mid-1900s, the cost to the federal government of a state tax immunity would also expand unless the definition of essential government functions was restricted.[30] In dicta, Justice Stone included bond issuance and a state's borrowing power in his definition of essential government functions.[31]

At this point, the test for intergovernmental tax immunity had evolved into an analysis of the government's activities. Rather than make a distinction based on governmental and non-governmental functions, activities were not entitled to tax immunity if the government undertook "a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State."[32] The Court applied this analysis in an attempt to avoid the practical problems of distinguishing between governmental and non-governmental activities.

The Court revised the rule for state tax immunity again in 1946 in *New York v. United States*.[33] This case perhaps best

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28. Helvering v. Gerhardt, 304 U.S. 405 (1938). The Court held that federal taxes on salaries paid to employees of the New York Port Authority were constitutional.

29. *Gerhardt*, 304 U.S. at 419-20. *See supra* note 27 and accompanying text.

30. *Gerhardt*, 304 U.S. at 416.

31. *Id.* at 417. South Carolina v. Baker, 108 S. Ct. 1355 (1988) relies on *Gerhardt* as one of the cases implicitly overruling Pollock v. Farmers' Loan Co., 157 U.S. 429 (1895), yet *Gerhardt* cites to *Pollock* with approval. *Gerhardt*, 304 U.S. at 417. *See infra* note 69 and accompanying text.

32. Helvering v. Powers, 293 U.S. 214, 227 (1934).

33. 326 U.S. 572 (1946).

summarizes the status of the law before *South Carolina v. Baker*. The Court reiterated that the federal government could not "interfere unduly with the State's performance of its sovereign functions of government."[34] However, Congress would be allowed to tax a state as long as two requirements were met. First, the tax must be on income earned which is "not uniquely capable of being earned only by a State . . . ."[35] Second, the tax must be non-discriminatory.[36]

III. Tenth Amendment Application to Taxes on States

The purpose of this section is to determine whether a tax which directly or indirectly affects a state would violate the tenth amendment. The tenth amendment reserves "powers not delegated to the [federal government] by the Constitution . . . to the States respectively . . . ."[37] However, the strength of the tenth amendment was severely limited by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[38] The *Garcia* decision held that provisions of the federal Fair Labor Standards Act applied to state employees.[39] *Garcia* expressly overruled a prior Supreme Court decision, *National League of Cities v. Usery*,[40] which held that the tenth amendment prevented Congress from applying federal minimum wage and overtime rules on state employees.

The Court in *National League of Cities* established a three-part analysis designed to prevent Congress from impairing a

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34. *Id.* at 587 (Stone, C.J., concurring).

35. *Id.* at 582. The Court held that the state could be taxed on income earned from mineral water sales since such sales were not uniquely government functions.

36. *Id.* at 582-583. A non-discriminatory tax is a tax which is applied equally to all parties which earn income in the activities in question. In *New York*, the Court upheld tax on mineral water sales since the tax was applied equally to all vendors of mineral water, not just a certain state which produced and sold mineral water. *New York* is also an important case because the tax in this case taxed the state directly.

37. U.S. Const. amend. X.

38. 469 U.S. 528 (1985).

39. *Id.* at 555-56.

40. 426 U.S. 833 (1976). The facts of *National League of Cities* and *Garcia* may be distinguishable. Both cases considered the application of the federal Fair Labor Standards Act, which sets minimum wage and overtime regulations, to state employees. However, the city-owned-and-operated mass-transit system at issue in *Garcia*, received 50% of its operating expenses and 75% of its capital outlays from the Department of Transportation, a federal agency. *Garcia*, 469 U.S. at 555. Since the transit system at issue in *Garcia* was funded primarily by the federal government, an argument could be made that regulation of the transit system was not a direct regulation of the state but a condition to receiving federal funds. The *Garcia* opinion did not address this issue.

state's ability to function effectively in the federal system. The analysis first considered whether a law regulated a state as a state. The second step considered whether the law affected an attribute of state sovereignty. The third part of the analysis considered whether the law impaired the state's ability to structure integral operations in areas of traditional government functions. These three factors would then be balanced against the interests of the federal government.[41] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[42] a case following *National League of Cities*, the Court's tenth amendment analysis focused on whether the federal law would directly impair a state's ability to structure integral operations in areas of traditional government functions.

However, the *Garcia* majority concluded that distinguishing between those government functions which were "traditional government functions" was unworkable and should be avoided. The *Garcia* majority relied on procedural safeguards inherent in the structure of the federal system and on the Constitution to protect a state's interest.[43] An example given by the *Garcia* opinion of a procedural safeguard in the federal system is the requirement that each state have two senators. These senators will ensure that their state's interest is protected.[44] This is one safeguard which will protect a state's interest from federal legislation. The result of *Garcia* is that Congress may regulate the activities of states as long as the procedural safeguards established in the Constitution have been followed.

Garcia was a 5 to 4 decision. Justice Powell disagreed with the majority's conclusion. He concluded, along with many critics of *Garcia*, that procedural guarantees do not provide states with adequate protection of their sovereignty.[45] Justice Powell concluded that although the Constitution provides for state representation, that representation is not adequate to protect against actions by Congress.[46] He pointing out that once a state's elected officials become members of Congress, they become federal em-

41. *National League of Cities*, 426 U.S. at 840-52.

42. 452 U.S. 264, 287-88 (1981).

43. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985). The Court concluded that the role given to the states in selecting senators and the President and the system of checks and balances established by the Constitution provides a measure of protection to the states.

44. *Id.* at 551.

45. *Id.* at 576-77 (Powell, J., dissenting).

46. *Id.*

ployees and are no longer responsible for their state's interest.[47] Justice Rehnquist, in his dissenting opinion in *Garcia*, predicted that the Court would "in time" back away from *Garcia* and readopt the *National League of Cities* test.[48]

In *South Carolina v. Baker*[49] the Court, in a 7 to 1 decision (Justice Kennedy did not participate), held that federal regulation of state bonds is constitutional under the tenth amendment. The majority relied on *Garcia* in rejecting the plaintiff's claim that the tax on unregistered state bonds was a violation of the tenth amendment. However, the Court acknowledged that the same result in this case would likely be reached under a *National League of Cities* test.[50]

South Carolina involved the taxing of unregistered state bonds. The Court did not address whether a federal tax on registered state bonds would violate the tenth amendment. Under *Garcia*, the presently followed rule, Congress would be free to tax registered bonds, so long as proper procedures and constitutional safeguards were observed.[51] If the Court were to back away from the *Garcia* decision, as the dissenters in that decision suggest, a *National League of Cities* analysis would likely be applied.[52] Even under this analysis, a federal tax on any state bond

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47. *Id.*

48. *Id.* at 579-80 (Rehnquist, J., dissenting). Justice Rehnquist refers to the test in *National League of Cities* as "a principle that will . . . in time again command the support of a majority of this court." Justice O'Connor also agreed with this conclusion. *Id.* at 589 (O'Connor, J., dissenting).

Both *Garcia* and *National League of Cities* were 5 to 4 decisions, Justice Blackmun being the swing vote. The elements most likely needed for a change from the *Garcia* rule are (1) an acceptable fact situation, and (2) a change in the Court. Justice Scalia and Justice Kennedy have taken the place of Chief Justice Burger and Justice Powell since the *Garcia* decision. However, both justices replaced dissenters in *Garcia* which means further changes will likely be needed to modify *Garcia*.

49. 108 S. Ct. 1355 (1988).

50. *Id.* at 1362. The plaintiffs argued that the tax on unregistered bonds was invalid because it forced the state to enact legislation to authorize bond registration. Although the Court relied on *Garcia* in deciding the tenth amendment issue, the Court responded that "even the pre-*Garcia* line of Tenth Amendment cases recognized that Congress could constitutionally impose federal requirements on States that States could meet only by amending their statutes." *Id.*

Justice Rehnquist, in his concurrence, applied the *National League of Cities* test. He concluded that the tax on unregistered state bonds had a *de minimis* effect on states and did not violate the *National League of Cities* test. *Id.* at 1370 (Rehnquist, J., concurring).

51. *See supra* note 43 and accompanying text. *See also* Rotunda, *Intergovernmental Tax Immunity and Tax Free Municipals After* Garcia, 57 U. COLO. L. REV. 849 (1986).

52. *See supra* note 48 and accompanying text.

would likely pass tenth amendment scrutiny. The tax on a state bond, while it is an indirect tax on states, is a tax on a taxpayer, not the state. The issue is the relationship between the federal government and taxpayers, not states. The taxing of individuals does not regulate a state as a state.[53] Thus, under either *National League of Cities* or *Garcia*, a federal tax on any state bond would likely survive tenth amendment scrutiny.

The Court in *South Carolina* concluded that a tax on unregistered bonds would not violate either the *National League of Cities* or *Garcia* tests. The result would likely be the same for registered bonds.[54] Although a tax on state bonds or any other state government function will ultimately be analyzed under the theory of intergovernmental tax immunity, the trend of limiting state rights under the tenth amendment is being followed in the area of intergovernmental tax immunity.[55]

IV. WHAT REMAINS OF INTERGOVERNMENTAL TAX IMMUNITY?

South Carolina v. Baker dicta lay the groundwork for deciding future cases involving the doctrine of intergovernmental tax immunity.[56] Much like the scope of the tenth amendment,

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53. One prong of the *National League of Cities* test is whether Congress is regulating a state as a state. *See supra* note 41 and accompanying text. A tax on an individual who earns income from a state bond is an indirect tax on the state. However, a direct tax on the state would likely be needed to meet this prong of the *National League of Cities* test.

The Court in *South Carolina* concluded that a tax on the interest earned on unregistered state bonds did regulate states as states. South Carolina v. Baker, 108 S. Ct. 1355, 1360-61 (1988). However, the fact that states have continued to issue unregistered taxable bonds indicates that the tax on bonds has not regulated states as states. *See New Twist: TIF Bonds*, Land Use Digest, Jan. 1989.

54. *See supra* notes 51-53 and accompanying text.

55. The Court in *South Carolina* rejected the use of an essential/non-essential test to determine intergovernmental tax immunity based on its rejection of the same test for tenth amendment purposes in *Garcia*. See *South Carolina*, 108 S. Ct. at 1367 n.14 (1988). *See also*, Comment, *The Constitutionality of Federal Income Taxation of Interest Earned on State and Municipal Bonds*, 50 ALB. L. REV. 55, 84-86 (1985).

56. The Court specifically addressed only the issue of whether the federal government could impose a tax on unregistered bonds. This is a narrow issue since states would be allowed to issue tax free registered bonds regardless of the Court's decision. However, in dicta, the majority opinion goes further to outline the current status of the doctrine of intergovernmental tax immunity. Five justices joined in the majority opinion.

Before the Court could address the issue of a tax on income from any state bonds or any other tax affecting states, Congress would have to enact the tax. The traditional tax exempt status of state bonds will put pressure on Congress not to pass such a tax. This is an example of the procedural safeguards which *Garcia* relies on to protect states from interference from the federal government. *See supra* note 43 and accompanying text.

the scope of intergovernmental tax immunity has been severely restricted since its inception in 1819.

The first step the Court took in restricting the future application of intergovernmental tax immunity was to establish that the federal government could levy taxes on the states which the states could not levy on the federal government.[57] This is a deviation from the basic premise of dual government on which the doctrine of intergovernmental tax immunity was originally inferred from the Constitution—that each government was supreme in its sphere.[58] The Court in *Indian Motorcycle v. United States*[59] held that our Constitution is based on the principle of dual governments and that the "operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States."[60] Thus, this first step the Court took contradicted the basis upon which the doctrine of intergovernmental tax immunity was created.

In addition to establishing that the tax immunity of states is inferior to that of the federal government, the Court suggested an analysis similar to the analysis used in *Garcia v. San Antonio Metropolitan Transit Authority*.[61] The Court confirmed that the essential/non-essential distinction will not be used to determine what activities are protected from federal taxes.[62] The Court then suggested that no limit be placed on the federal government's power to tax the states except that the tax be nondiscriminatory.[63] The Court concluded that a nondiscriminatory

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57. *South Carolina*, 108 S. Ct. at 1366-7. The Court stated: "The rule with respect to state tax immunity is essentially the same [as that with respect to federal tax immunity], except that at least some nondiscriminatory federal taxes can be collected directly from the States even though a parallel state tax could not be collected directly from the Federal Government." *Id.* (citations omitted).

58. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 400 (1932). *See supra* notes 17-19 and accompanying text.

59. 283 U.S. 570 (1931).

60. *Id.* at 575.

61. 469 U.S. 528 (1985).

62. The Court had previously rejected this distinction in Helvering v. Powers, 293 U.S. 214 (1934), but still applied a test based on usual state government functions which are immune from federal taxes. *See supra* note 32 and accompanying text.

63. South Carolina v. Baker, 108 S.Ct. 1355, 1367-68 n.14 (1988). "The nondiscrimination principle at the heart of modern intergovernmental tax immunity caselaw does not leave States unprotected from excessive federal taxation—it merely recognizes that the best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion." *Id.* Compare this to the *Garcia* opinion which concludes that safeguards inherent in the Constitution are the best safeguard against excessive intrusion of the federal government into state functions. *See supra* note 43 and accompanying text.

standard is the only judicially manageable standard. Any other standard would not give courts a bright line rule to apply and would require second-guessing by the courts. The Court also suggested that political safeguards, such as elected representatives, would protect the states from excessive taxes.[64]

The test for intergovernmental immunity suggested in *South Carolina* should send a message to states. Should Congress pass legislation which directly or indirectly taxes states, states will not be able to rely on intergovernmental tax immunity to protect themselves from any federal taxes. The standard the Court suggested, which allows any non-discriminatory tax, is nothing more than a restatement of the rule established by article I, section 8 of the Constitution which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States . . . ." This section of the Constitution requires that any tax structure established by Congress not discriminate between states.[65] The practical effect of the *South Carolina* guidelines is that the doctrine of intergovernmental tax immunity is abolished, and article I, section 8 of the Constitution is the standard to be applied to taxes by the federal government on the states.

V. CONCLUSION

The doctrine of intergovernmental tax immunity was originally inferred from the Constitution as a means of self-preservation for the states. At the time the doctrine was created, the power of states was considered to be equal to the power of the federal government.[66] However, the clear trend of recent Supreme Court decisions has been to restrict the scope of protection from federal government interference given to states. The trend is most visible in the area of the tenth amendment. The tenth amendment now assures states of no more than political safeguards to protect a state's interest against actions of the federal government.[67] The Court has also followed this trend in re-

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64. *South Carolina*, 108 S. Ct. at 1367-68 n.14. The essential function and non-essential function distinction is an example of a standard which resulted in second guessing by courts because an acceptable objective definition of essential functions could not be made.

65. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 318 (2d Ed. 1988).

66. Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). *See supra* note 13 and accompanying text.

67. The current application of the tenth amendment is summarized in Garcia v. San

stricting the scope of intergovernmental tax immunity. Indeed, all that remains of intergovernmental tax immunity for the states are political and procedural safeguards created expressly by the Constitution.[68] In essence the Court is saying that governmental tax immunity will no longer be recognized for states. Should Congress enact a direct or indirect tax on states, states must invoke express sections of the Constitution to seek protection from federal government taxes which interfere with essential functions of state government.

The *South Carolina* Court justifies the decision by stating that the scope of intergovernmental tax immunity was already restricted before this case came before the Court.[69] As this comment has shown, the trend of the Court in the last five decades has been to restrict the scope of intergovernmental tax immunity.[70] Perhaps this trend has resulted in the danger Professor Tribe warned of in his treatise. "If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[71] The Court's decision in *South Carolina* is the approval of another small decision which has resulted in the gutted shell of intergovernmental tax immunity for states.

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Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See supra* notes 37-55 and accompanying text for a discussion on *Garcia* and the tenth amendment.

68. The standard the Court suggested in *South Carolina* would allow any non-discriminatory tax on states. *See supra* notes 56-65 and accompanying text for summary of how the scope intergovernmental tax immunity has been restricted.

69. The decision in *South Carolina* is in direct conflict with Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), a Supreme Court decision holding that state bond interest is immune from federal tax. The Court refused to expressly overrule *Pollock*, concluding that *Pollock* had implicitly been overruled by cases decided between 1895 and 1988.

70. *See supra* notes 28-36 and accompanying text.

71. L. TRIBE, *supra* note 65, at 381 (2d ed. 1988). Justice O'Connor cited this quotation in her dissenting opinion in *South Carolina*. She applied that warning to the circumstances of *South Carolina*. The approval of Congress' tax on unregistered state bonds may lead to taxes which will interfere with more essential state functions. South Carolina v. Baker, 108 S. Ct. 1355, 1372 (1988) (O'Connor, J., dissenting).